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17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
 19 **OAKLAND DIVISION**

20 RUSSELL BRADBERRY, individually and on
 21 behalf of a class of similarly situated individuals,

22 Plaintiff,

23 vs.

24 T-MOBILE USA, INC., a Delaware corporation

25 Defendant.

26 Case No. C-06-6567 (CW)

27 **DEFENDANT MBLOX'S NOTICE OF
 28 MOTION AND MOTION FOR JOINDER,
 OR IN THE ALTERNATIVE, TO
 CONSOLIDATE CASES; MEMORANDUM
 IN SUPPORT THEREOF**

Judge: The Honorable Claudia Wilken

Date: November 29, 2007

Time: 2:00 p.m.

Courtroom: 2, 4th Floor

29 RUSSELL BRADBERRY, individually and on
 30 behalf of a class of similarly situated individuals,

31 Plaintiff,

32 vs.

33 MBLOX, INC., a Delaware corporation,

34 Defendant.

35 Case No. C-07-5298 (PJH)

NOTICE OF MOTION AND MOTION**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on November 29, 2007, at 2:00 p.m., or as soon thereafter as the matter may be heard, before the Honorable Claudia Wilkens of the above-entitled Court, located in Courtroom 2, Fourth Floor, 1301 Clay Street, Suite 400 S, Oakland, CA 94612-5212, Defendant MBLOX, INC. (hereinafter "mBlox") in the case entitled *Bradberry v. mBlox, Inc.*, C-07-5298 (PJH) (hereinafter "*Bradberry II*"), will respectfully move this Court, pursuant to Rules 20 and 42(a) of the Federal Rules of Civil Procedure, for an order joining, or in the alternative, consolidating the *Bradberry II* action with the action currently pending in this Court entitled *Bradberry v. T-Mobile USA, Inc.*, C-06-6567 (CW) (hereinafter "*Bradberry I*").

This motion for joinder or to consolidate is based on the grounds that the two cases involve the same transaction, occurrence or series of transactions or occurrences and also involve common questions of law and fact, and joining or consolidating the two cases would be in the interest of judicial efficiency, and would not cause delay, confusion or prejudice to any party. This motion is based on this Notice of Motion and Motion to Consolidate, the accompanying Memorandum of Points and Authorities, the accompanying Declaration of Chung-Han Lee and the attached exhibits thereto, and all pleadings, papers and records presently on file in both *Bradberry I* and *Bradberry II*.

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rules 20 and 42(a) of the Federal Rules of Civil Procedure, Defendant mBlox hereby respectfully requests that this Court consolidate the *Bradberry II* matter with the action currently pending in this Court entitled *Bradberry v. T-Mobile USA, Inc.*, C-06-6567 (CW). In support of this motion, mBlox states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 2007, Plaintiff RUSSELL BRADBERRY (hereinafter "Bradberry") filed the *Bradberry II* action in the Superior Court of the State of California for the County of Santa Clara. A copy of the state court complaint is attached as Exhibit A to the Declaration of Chung-Han Lee. On October 17, 2007, Defendant mBlox timely removed the above-captioned action to this Court pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446, and 1453. This case is subject to removal and properly before this

1 Court pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1332(d) and 1453 as
 2 well as 28 U.S.C. § 1367(a). The removed case was assigned to the Honorable Phyllis J. Hamilton and
 3 was captioned *Bradberry v. mBlox, Inc.*, C-07-5298 (PJH) (“*Bradberry II*”). A copy of the Notice of
 4 Removal (without exhibits) is attached as Exhibit B to the Declaration of Chung-Han Lee.

5 However, already pending before this Court at the time of the removal was Plaintiff Bradberry’s
 6 similar action against T-Mobile entitled *Bradberry v. T-Mobile USA, Inc.*, C-06-6567 (CW) (“*Bradberry*
 7 *I*”). *Bradberry I* was filed in this Court on October 20, 2006, and an amended complaint was filed on
 8 February 23, 2007. A copy of the original *Bradberry I* complaint is attached as Exhibit C to the
 9 Declaration of Chung-Han Lee.

10 Both the *Bradberry I* and the *Bradberry II* complaints involve the same Plaintiff and allege
 11 claims against T-Mobile and mBlox that arise out of the same transaction, occurrence, or series of
 12 transactions or occurrences. Specifically, the underlying facts and the underlying bases for Plaintiff’s
 13 claims against T-Mobile and mBlox in both cases involve the exact same series of transactions or
 14 occurrences as follows:

- 15 (1) On November 2, 2005, Plaintiff visited the store of an authorized T-Mobile sales
 16 representative located in Visalia, California to purchase new cell phone service for his
 personal use. *Bradberry I*, ¶ 8; *Bradberry II*, ¶ 21.
- 17 (2) On that same day, in exchange for a T-Mobile cell phone plan of 600 “anytime” minutes,
 18 Plaintiff agreed to pay T-Mobile \$39.99 each month for a period of 12 months. (A copy
 of T-Mobile’s Service Agreement with Plaintiff is attached hereto as Exhibit A).
Bradberry I, ¶ 9; *Bradberry II*, ¶ 22.
- 20 (3) Upon execution of his Service Agreement and activation of his cellular telephone
 21 account, T-Mobile provided Plaintiff a cellular phone number or “GSM #” (that is, a
 Global System for Mobile Communications number) of “tmo+619446----” *Bradberry I*, ¶
 22 10 (the *Bradberry I* version contained the entire number); *Bradberry II*, ¶ 24.
- 23 (4) Unbeknownst to Plaintiff, T-Mobile provided him with a recycled “dirty” phone number
 24 – one saddled with preexisting obligations, encumbrances and billing arrangements for
 products and services authorized to be purchased, if at all, by the previous owner(s)
 and/or user(s) of that number. *Bradberry I*, ¶ 11; *Bradberry II*, ¶ 25.
- 26 (5) Thus, beginning on or about November 2, 2005 – the same day Plaintiff obtained his cell
 27 phone number and started receiving service from T-Mobile – and continuing through at
 least April 28, 2006, Plaintiff’s cell phone received multiple unwanted “premium” text
 message calls on a near daily basis from a company called Cellfish Media, LLC f/d/b/a

1 Lagardere Active North American, Inc. (“Cellfish”), a third-party seller of cellular
 2 ringtone products and services. “Premium” text messages are apparently those that
 3 include various forms of software, such as ringtones. *Bradberry I*, ¶ 12; *Bradberry II*, ¶
 26.

4 (6) Throughout the relevant period, Plaintiff received dozens of messages. *Bradberry I*, ¶ 13;
Bradberry II, ¶ 27.

5 (7) At no time did Plaintiff authorize the purchase of said products and services offered by
 6 Cellfish and at no time did Plaintiff consent to Cellfish’s sending of text messages to his
 7 telephone number. *Bradberry I*, ¶ 14; *Bradberry II*, ¶ 28.

8 (8) Throughout the relevant time period, T-Mobile billed Plaintiff for “premium” text
 9 messaging charges of \$.50 for each of the incoming “premium” text messages Defendant
 10 sent to Plaintiff, in addition to T-Mobile’s standard charge of \$.05 per each incoming text
 11 message. *Bradberry I*, ¶ 15; *Bradberry II*, ¶ 29.

12 (9) At no time did Plaintiff authorize T-Mobile to bill him for said charges. *Bradberry I*, ¶
 13 16; *Bradberry II*, ¶ 30.

14 (10) The purported authorization to be billed for such charges was obtained from an
 15 unidentified person with the same “GSM #” eventually assigned by T-Mobile to Plaintiff
 16 (“tmo+6194468xxx”); however, the authorization for the subject charges was obtained on
 17 July 13, 2005 – a date more than three months prior to the time that Plaintiff signed his
 18 Service Agreement with T-Mobile, obtained that same cell phone number from T-
 19 Mobile, or started receiving T-Mobile service. *Bradberry I*, ¶ 23; *Bradberry II*, ¶ 31
 20 (slight wording differences).

21 (11) Plaintiff could not possibly have authorized the charges for which he was being billed.
 22 He did not have any account with T-Mobile at that time. Indeed, from May 2005 until
 23 October 2005, Plaintiff was out of the country in the Persian Gulf serving in the United
 24 States Navy aboard the U.S.S. Nimitz, without access to a working cellular phone.
Bradberry I, ¶ 24; *Bradberry II*, ¶ 32 (slight wording differences).

25 These identical statements in both the *Bradberry I* and *Bradberry II* complaints alleging the same series
 26 of transactions or occurrences warrant joinder or consolidation of these actions.

27 ARGUMENT

28 I. ***Bradberry I* and *Bradberry II* Should Be Joined Because the Claims in Both Arise Out of the 29 Same Series of Transaction or Occurrences.**

30 Rule 20 of the Federal Rules of Civil Procedure provides, *inter alia*:

31 All persons... may be joined in one action as defendants if there is asserted against them
 32 jointly, severally, or in the alternative, any right to relief in respect of or arising out of the
 33 same transaction, occurrence, or series of transactions or occurrences and if any question
 34 of law or fact common to all defendants will arise in the action.

1 FED. R. CIV. P. 20(a). The joinder rule is to be construed liberally in order to promote trial convenience
 2 and to expedite final determination of disputes, thereby preventing multiple lawsuits. *League to Save*
 3 *Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977). As the U.S.
 4 Supreme Court directed: “Under the Rules, the impulse is toward entertaining the broadest possible
 5 scope of action consistent with fairness to the parties; **joinder of claims, parties and remedies is**
 6 **strongly encouraged.**” *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966) (emphasis added).

7 Rule 20(a) imposes two specific requirements for the permissive joinder of parties: “(1) a right to
 8 relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same
 9 transaction or occurrence or series of transactions or occurrences; and (2) some question of law or fact
 10 common to all parties must arise in the action.” *Desert Empire Bank v. Insurance Co. of North America*,
 11 623 F.2d 1371, 1375 (9th Cir. 1980). The cases mBlox seeks to join here meet both of these
 12 requirements.

13 First, the “same transaction, occurrence or series of transactions or occurrences” is broadly
 14 construed. “It is sufficient if there is a logical relationship between the claims joined.” *Desert Empire*
 15 *Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1375 (9th Cir. 1980). Here, the claims in the
 16 two cases go beyond merely “a logical relationship” as both cases involve a common nucleus of
 17 operative facts. In fact, the underlying series of transactions or occurrences **are exactly the same** in both
 18 the claims against T-Mobile and the claims against mBlox. Specifically, Plaintiff alleges that wireless
 19 carriers (such as T-Mobile) “recycle dirty cellular telephone numbers” in which the carriers provide
 20 telephone “numbers that were previously owned and/or used by other persons or entities” and are
 21 “encumbered with pre-existing billing obligations for products and services authorized to be purchased,
 22 if at all, by the previous owners and/or users of those numbers.” *Bradberry I*, ¶ 1; *Bradberry II*, ¶ 5.
 23 Plaintiff alleges that this practice has resulted in wireless carriers (like T-Mobile) and content
 24 aggregators (like mBlox) systematically, repeatedly and without authorization causing charges to be
 25 placed on the cell phone bills of thousands of consumers across the country for content that was never
 26 authorized to be purchased by the current owners of the affected phone numbers. *Bradberry I*, ¶ 2;
 27 *Bradberry II*, ¶ 7. These allegedly unauthorized charges by wireless carriers and content aggregators is
 28 the wrongful conduct that Plaintiff seeks to remedy in both of these actions. In terms of the events that

1 are alleged to have occurred and how both the class Plaintiffs and the named Plaintiff have been
 2 affected, the two complaints are mirror images of each other. In fact, the allegations in *Bradberry II*
 3 relating to the named Plaintiff are almost taken *verbatim* from the corresponding allegations in
 4 *Bradberry I*. *Bradberry II*, ¶¶ 21-32; *Bradberry I*, ¶¶ 8-16; 23-24.

5 Second, the *Bradberry I* and *Bradberry II* actions involve common questions of law and fact. As
 6 described above, the underlying factual issues are exactly the same in both cases. Moreover, both
 7 actions involve common legal issues as both cases are putative class actions brought by the same named
 8 Plaintiff, Russell Bradberry, with the putative classes and subclasses proposed in each complaint
 9 strongly paralleling one another:

<i>Bradberry I</i>	<i>Bradberry II</i>
11 Class: [A]ll T-Mobile wireless telephone 12 subscribers who received a telephone number 13 from T-Mobile and suffered losses or damages as 14 a result of T-Mobile billing for products and 15 services not authorized by the owner of the number, but, rather, if at all, by a prior owner or user of the number. <i>Bradberry I</i> ¶ 44.	Class: [A]ll wireless telephone subscribers in the nation who were charged by mBlox for mobile content services not authorized by the existing owner of the telephone number, but, rather, if at all by a prior owner or user of the number. <i>Bradberry</i> II ¶ 43A.
16 Subclass: [A]ll members of the Class who entered 17 into subscription contracts within the state of California. <i>Bradberry I</i> ¶ 45.	Subclass: [A]ll members of the Class who entered into subscription contracts within the state of California. <i>Bradberry II</i> ¶ 44B.

19 In addition, both actions involve a claim for Unlawful, Unfair and Deceptive Business Practice in
 20 violation of the California Business & Professions Code § 17200 *et seq.* based on the alleged wrongful
 21 conduct by T-Mobile and mBlox. Thus, the second requirement of a common question law or fact is
 22 easily met.

23 Given the identical factual allegations and legal claims contained in both complaints, joinder of
 24 these two cases is not only appropriate, but essential. Therefore, the Court should grant this motion and
 25 join the *Bradberry I* and *Bradberry II* actions pursuant to Rule 20(a) of the Federal Rules of Civil
 26 Procedure.

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1 **II. Alternatively, *Bradberry I* and *Bradberry II* Should Be Consolidated.**

2 Should the Court decide against joinder of the *Bradberry I* and *Bradberry II* actions, mBlox
 3 alternatively requests that the Court consolidate the two actions. Rule 42(a) of the Federal Rules of
 4 Civil Procedure provides that “[w]hen actions involving a common question of law or fact are pending
 5 before the court...it may order all the actions consolidated.” This Court has broad discretion under Rule
 6 42 to consolidate cases pending in the same district. *Investors Research Co. v. United States Dist. Ct.*
 7 *for Cent. Dist. of California*, 877 F.2d 777 (9th Cir. 1989). In exercising its broad discretion to order
 8 consolidation, the Court should weigh the saving of time and effort consolidation would produce against
 9 any inconvenience, delay or expense that it would cause. *Heune v. United States*, 743 F.2d 703, 704
 10 (9th Cir. 1984); *Southwest Marine, Inc. v. Triple A Mach. Shop., Inc.*, 720 F. Supp. 805 (N.D. Cal.
 11 1989).

12 As discussed in detail above, the factual allegations and legal claims in both cases share common
 13 aspects of law and fact. mBlox will not repeat those similarities here.

14 Instead, mBlox will focus on the factors weighing in favor of consolidation. First, consolidating
 15 the two cases will avoid duplication of evidence and procedures between the cases as well as the risk of
 16 inconsistent adjudications. In particular, consolidating the two cases will result in efficiencies in the
 17 conduct of discovery relating to the putative class representative (Plaintiff Bradberry), the two
 18 defendants (T-Mobile and mBlox) as well as third parties in both *Bradberry I* and *Bradberry II*, who
 19 were allegedly involved in the unauthorized SMS text messages that form the gravamen of both
 20 complaints. Maintaining two separate proceedings is highly likely to require plaintiffs and defendants
 21 (as named or third parties in one or the other proceeding) to give duplicative discovery responses or
 22 testimony. Further, consolidation will result in efficiencies in resolving legal and factual issues
 23 throughout the proceedings, including relating to whether *Bradberry I* and *Bradberry II* are properly
 24 maintained as class actions. The modest differences in factual and legal issues between the two cases
 25 are outweighed by the risk of inconsistent adjudications, which may go to such central issues as consent
 26 to receive allegedly unauthorized content, defendants’ intent, and allocation of damages, if any, of
 27 individual class plaintiffs.

28 //

1 Second, neither Plaintiff nor T-Mobile will be prejudiced by consolidation. Consolidation of
2 these two actions is appropriate because *Bradberry I* is still in the relatively early stages of the case with
3 Defendant T-Mobile only having recently answered the Amended Complaint on September 6, 2007.
4 Moreover, Plaintiff Bradberry has not yet filed his Motion for Class Certification in *Bradberry I*.¹
5 consolidation will not result in delay

6 Third, Plaintiff will not be inconvenienced or unfairly prejudiced in any way by consolidation.
7 In fact, because Plaintiff's counsel are the same for both *Bradberry I* and *Bradberry II*, consolidating the
8 two cases should make it more convenient for Plaintiff's counsel as they will have a single calendar and
9 set of procedures for these two common cases. Further, it will be more convenient for the named
10 Plaintiff to appear only once for his deposition in both *Bradberry I* and *Bradberry II* rather than being
11 subjected to two (or more) substantially similar and duplicative depositions.

12 Thus, because of the common questions of law and fact and because all factors weigh in favor of
13 consolidation, this Court should grant this motion (if it denies the motion to join) and consolidate the
14 *Bradberry I* and *Bradberry II* actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

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27 ¹ Defendant mBlox respectfully requests that the Court take judicial notice of the pleadings in
28 *Bradberry I*.

CONCLUSION

For the reasons set forth above, defendant mBlox respectfully requests that the Court grant this motion and join the *Bradberry v. mBlox, Inc.*, C-07-5298 (PJH) action with the action entitled *Bradberry v. T-Mobile USA, Inc.*, C-06-6567 (CW) pursuant to Rule 20(a) of the Federal Rules of Civil Procedure. Alternatively, mBlox respectfully requests that the actions be consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: October 17, 2007

WILDMAN, HARROLD, ALLEN & DIXON LLP

By: /s/ Chung-Han Lee

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